UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MONNA PORTER, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER DA-1221-98-0056-W-1 DATE: FEB 02 1999

Ronald H. Tonkin, Esquire, Houston, Texas, for the appellant.

Patricia L. Makin, Esquire, Houston, Texas, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a concurring opinion.

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the February 4, 1998 initial decision that denied her request for corrective action. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the appeal for further adjudication, including a hearing on her whistleblowing claim.

BACKGROUND

¶2 The appellant served as an Investigative Assistant, GS-6, in the Office of the Resident Agent in Charge for U.S. Customs in Oklahoma City, Oklahoma. On

June 16, 1997, she was detailed to the same position with the Customs National Aviation Center in Oklahoma City. She filed a complaint with the Office of Special Counsel (OSC) claiming that the detail was in retaliation for her whistleblowing activity, specifically, her disclosure on May 12, 1997, to Internal Affairs that her supervisor had ignored a request for backup from an agent in the field, thereby placing that agent in danger. Initial Appeal File (IAF), Tab 1, Exhibit A. She also stated to OSC that, because of her disclosure, the agency had given her a letter of reprimand. *Id.* On July 8, 1997, while the matter before OSC was pending, the appellant asked to be reassigned to the Office of the Special Agent in Charge for U.S. Customs in Los Angeles because her husband's employer, the Federal Bureau of Investigation, was transferring him to Santa Ana. *Id.* at Tab 4, Subtab 4f. She was reassigned, effective August 31, 1997. *Id.* at Subtab 4a. Just prior to that date, on August 26, 1997, OSC issued the appellant a closure letter, advising her that it had terminated its inquiry into the allegation regarding her detail. *Id.* at Tab 1, Exhibit B.

¶3 The appellant filed an individual right of action (IRA) appeal. Citing 5 U.S.C. § 1221(g)(1)(A)(ii) and (B) in support of her request for corrective action, she sought damages for the emotional trauma she had suffered, restoration of leave, overtime pay, and a cost-of-living allowance for living in Los Angeles, as well as attorney fees and costs for prosecuting the appeal. She requested a hearing before the Board. *Id.* at Tab 1. The agency filed a motion to dismiss on the basis that the detail of which the appellant complained had terminated, based on her request to be reassigned, and that, therefore, her IRA appeal as to the detail should be dismissed as moot. *Id.* at Tab 4. The agency further argued that the appellant's request for damages was speculative and unproved. And, as to the letter of reprimand to which she referred, the agency stated that, as to its knowledge, none was ever issued to her. *Id.*

¶4 The administrative judge ordered the appellant to identify the personnel actions for which she sought corrective action from OSC, and to explain why her petition was not rendered moot by the termination of her detail. *Id.* at Tab 8. In her response, the appellant acknowledged that she had never received a letter of reprimand. *Id.* at Tab 9. She further stated that, even though the detail had ended, the Board had jurisdiction over her appeal because "there [] remains the relief requested in the petition for corrective action." *Id.*

¶5 In her initial decision, the administrative judge found that the appellant had failed to show that she raised any personnel action with OSC other than her detail, which was terminated when she voluntarily transferred to Los Angeles. Initial Decision (ID) at 3. Concluding that there was no corrective action the Board could order regarding the detail and that the issues concerning it were now moot, the administrative judge denied the appellant's request for corrective action. *Id.*

¶6 In her petition for review, the appellant argues that the administrative judge denied her a hearing, and erroneously denied her request for corrective action without ruling on her claim for damages and attorney fees. Petition for Review File, Tab 1.

ANALYSIS

¶7 To establish Board jurisdiction over an IRA appeal, an appellant must show by preponderant evidence that: (1) She engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); (2) the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2); and (3) she raised the issue before OSC, and proceedings before OSC were exhausted. *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). To be entitled to a jurisdictional hearing, the appellant must make allegations of fact which, if proven, could establish these jurisdictional elements. *Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 84 (1996).

¶8 Here, the appellant has alleged such facts, that is, that she made a protected disclosure to Internal Affairs by claiming that her supervisor ignored a request for back up from an agent in the field, thereby posing a specific danger to that employee's health; that the agency's action in detailing her[1] to the Customs National Aviation Center in Oklahoma City constituted a "personnel action" as defined in 5 U.S.C. § 2302(a)(2)(A)(iv); and that she exhausted proceedings before OSC. IAF, Tab 1, Exhibit B.

¶9 In denying the appellant's request for corrective action, the administrative judge found that, because her detail was terminated when she transferred to Los Angeles, there was no corrective action the Board could order and the issues concerning the detail were rendered moot. ID at 3. We disagree.

¶10 First, it is well established that the Whistleblower Protection Act (WPA) is a remedial statute; as such it should be broadly construed in favor of those whom it was intended to protect. *See Wagner Seed Co. v. Bush*, 709 F.Supp. 249, 252 (D.D.C. 1989), *aff'd*, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 970 (1992); *see also King v. Department of Health & Human Services*, 71 M.S.P.R. 22, 32 (1996) (the WPA is remedial legislation, intended to improve protections for federal employees, and should be construed to effectuate that purpose). Here, the agency, in fact, detailed the appellant to another position, an action which she did not seek, which she considered to be a forced transfer, and which prompted her to file a complaint with OSC. IAF, Tab 1, Exhibit A. The fact that, while her complaint was pending, she was able to "extricate[]" herself from the detail, the

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[1] As noted, and contrary to the administrative judge's finding, the appellant originally claimed to OSC that the agency had also given her a letter of reprimand because of her disclosure. Initial Appeal File (IAF), Tab 1, Exhibit A. OSC's closure letter did not address that claim. *Id.* at Exhibit B. In any event, the appellant later advised the administrative judge that, in fact, she was unaware of ever having received a letter of reprimand during her government career. *Id.* at Tab 9. Based on that admission, and the lack of any record evidence to contradict it, we deem the reprimand no longer to be a personnel action under review, and we will not further address it.

very action of which she complained, *id.* at Tab 9, does not mean that it never occurred. *See Frazier v. Merit Systems Protection Board*, 672 F.2d 150, 161 (D.C. Cir. 1982) (the fact that subsequent events, the employees' resignations, made the originally requested form of relief, rescission of their transfers, inappropriate did not render their appeals moot). Thus, just because the appellant was able to voluntarily remove herself from the perceived harassment does not, in and of itself, render moot or otherwise cure any prior retaliatory action by the agency.

¶11 Nor do we agree with the administrative judge's finding that, because the appellant's detail was terminated, "there is no corrective action that the Board could order." ID at 3. On the contrary, in cases where it finds reprisal based on whistleblowing, the Board is statutorily authorized to order broad relief, that is, such corrective action "as [it] considers appropriate." 5 U.S.C. § 1221(e)(1). In addition to the traditional status quo remedies, section 1221(g)(1)(A)(i) and (ii), the law provides that the Board may order the payment of medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages, 5 U.S.C. § 1221(g)(1)(A)(ii).[2] Pursuant to section 1221(g)(1)(B), corrective action shall include attorney fees and costs. The Board shall also refer a matter to the Special Counsel if it determines that there is reason to believe that a current employee may have committed a prohibited personnel practice. 5 U.S.C. § 1221(f)(3).

¶12 It is true that a detail, unlike a demotion or a suspension, is not "facially stigmatizing," *see Hoever v. Department of the Navy*, 70 M.S.P.R. 386, 389 (1996), and that the appellant has not asked that the record of her detail be deleted from her personnel record. As such, the remedies of placing her, as nearly as

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[2] The statutory provision refers to consequential "changes," but it is apparent that consequential "damages" was intended. *See Hoever v. Department of the Navy*, 70 M.S.P.R. 386, 388 n.2 (1996).

possible, in the position she would have been in had the prohibited personnel practice not occurred, and of providing her back pay and benefits, may not be applicable. However, consequential damages, and the payment of attorney fees[3] and costs, remain viable forms of corrective action in this case.[4] As to the former, we note the appellant's assertion that her request for transfer and attendant damages were related to the alleged retaliatory detail. IAF, Tab 1. If so, then, arguably, damages for such would be considered foreseeable and payment could be ordered by the Board. *See Special Counsel v. Department of Transportation*, 71 M.S.P.R. 661, 664 (1996).[5]

¶13 We conclude, therefore, that the appellant's IRA appeal was not rendered moot simply because her detail was terminated, and that the administrative judge improperly dismissed her case without affording her the opportunity for an adjudication of the merits of her claim, or even the opportunity to make a limited evidentiary showing on damages. Accordingly, the case must be remanded. *See Walton v. Department of Agriculture*, 78 M.S.P.R. 401, 403-04 (1998).

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[3] The appellant has been represented by counsel throughout the proceedings before the Board.

[4] In view of these claims, we need not determine whether, in their absence, the possibility of the Board's referring a matter to the Special Counsel would preclude the appeal from being moot.

[5] We need not reach the issue of which types of damages appellant claims may be awarded as consequential damages since that matter was not adjudicated by the administrative judge.

ORDER

¶14 On remand, the administrative judge shall convene a hearing and adjudicate the merits of the appellant's whistleblowing claim. If the administrative judge finds retaliation, she should also adjudicate the appellant's claim for consequential damages and determine if other corrective action is appropriate.

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF BETH S. SLAVET, VICE CHAIR

in *Porter v. Department of the Treasury*,

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I join in the majority opinion in this case which finds that the appellant's appeal was not rendered moot by the fact that her detail was terminated, and that, therefore, the case must be remanded for an adjudication on the merits of her whistleblowing claim. I write separately, however, because, although the appellant's request for attendant damages includes damages for emotional trauma, IAF, Tab 1, the majority does not reach the issue of which types of damages may be awarded as consequential damages, as provided for in 5 U.S.C. § 1221(g)(1)(A)(11), thus providing no guidance to the administrative judge with respect to the appellant's claim for consequential damages in the event the administrative judge finds retaliation. As set forth in my dissent in *Hasler v. Department of the Air Force*, 79 M.S.P.R. 415, 421-424 (1998), the statute does not authorize the award of damages for nonpecuniary harms such as emotional or mental distress. Therefore, if, on remand, the administrative judge were to find retaliation based on whistleblowing and proceed to adjudicate the appellant's claim for consequential damages, I would not allow damages in connection with her claim of emotional distress.

Beth S. Slavet
Vice Chair